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No:

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1984

HANS BOTHKE, PETITIONER

V.

ERNEST L. RACCA, RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

HANS BOTHKE
400 S. Flower # 156
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92668
Tel: (714) 978-2724
Petitioner in
pro per.

QUESTION PRESENTED.

Whether low level revenue officer's claimed qualified immunity from a constitutional damage suit, demonstrating Fifth Amendment and I.R.Code, 1954, Sections violations, is abrogated because a court subsequently determines based on its errors in its memorandum that constitutional and statutory rights were not violated; and that congressional defined safeguards as set forth in the Fifth Amendment and in Sections of the I.R.Code do not constitute clearly established law and rights, and violating the same was objectively reasonable conduct?

PARTIES TO THE PROCEEDING

The parties to the proceeding are as shown in the caption:

HANS BOTHKE, Petitioner and

ERNEST L.RACCA,Respondent.

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PETITION FOR A WRIT OF CERTIORARI
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FOR THE NINTH CIRCUIT

Hans Bothke,in pro per,petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW.

The memorandum of the Court of Appeals filed December 27,1983 (App.infra,1a) was not issued for publication.

The opinion of the District Court (App., infra,6a) is not yet reported.

JURISDICTION

The petition for rehearing en banc was rejected by order on September 26,1984 (App.,infra,7a)

The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTES INVOLVED

The relevant provisions of Sections 6211, 6212,6213,6321,6322 and 6331 of the Internal Revenue Code of 1954 (26 U.S.C) are set forth in App.,infra,E and F)

CONSTITUTIONAL PROVISION

The relevant provision of the Fifth Amendment to the U.S.Constitution states in part:

> "No person shall be*** deprived of life,liberty,or property,without due process of law;"

STATEMENT OF THE CASE.

The basis for federal jurisdiction in the District Court was invoked under Title 28 U.S.C.,Section 1331(a);1361 and 1348(a)(1)(2) &(3);Title 26,U.S.C.,Section 6212,6213 and 7214;Title 42 U.S.C.,Section 1983,1985

and 1986;Title 18 U.S.C. Section 242; and the Fourth and Fifth Amendment to the U.S. Constitution.

The basis for Jurisdiction in the Court of Appeals was invoked under Title 28 U.S.C. Section 1291.

Bothke had filed timely income tax returns for the years 1977 and 1979.

A brief summary of facts relative tax year 1977 is essential for clarity to demonstrate Racca's involvement therein.

Subject tax year 1977,Bothke's salaries were levied by a revenue officer named Terry,without an official proposed assessment,without an audit,without a requested notice of deficiency by Bothke,without a requested hearing and without affording a judicial redetermination by an impartial tribunal of alleged demands as granted to other taxpayers.

Bothke then informed by his employer of the forth coming levy warned Terry of her procedural inefficiencies and of her

violation of Sect. 6213,26 U.S.C.,the Fifth Amendment and Bothke's rights thereunder, and that she will be sued for the same.

Bothke due to the forthcoming unlawful levy on his salaries by and through his employer Fluor was forced to terminate his employment to prevent continuous unlawful levying.Bothke had no legal remedy because no official tax liability existed which would have provided access for Bothke to the U.S.Tax Court for a redetermination in accordance with due process requirements.

Bothke's termination of employment allowed Terry to levy only $ 3,415.43 out of the alleged $ 6,177.87. The balance of $ 2,762.44 alleged and demanded by Racca initiated his involvement in tax year 1977.

Bothke sued Terry.During the proceedings the District Court ignored Terry's violations of F.R.C.P's,Local Rules,committed perjury and submission of fraudulent documents in the record,as submitted to this honorable court in 83-1506,and held Terry

immune from liability of damages.Bothke appealed and the Ninth Circuit Court's opinion was published in Bothke v.Fluor & Terry, 713 F 2d 1405. Based on a petition for a writ of certiorari by Terry this Court vacated the judgment of the Appeals Court in light of Davis v.Scherer,No: 83-490 and remanded the case to the lower Court who then remanded it back to the District Court wherein the proceedings are in progress.

Subsequent filing his 1979 return, Bothke received from the IRS a notice of correction of arithmetic for mathematical error alleging Balance due IRS $ 1,621.56 dated August 11,1980.(App.G,infra,16a)

Bothke had also received such notice for tax year 1977 which was claimed to be sent by Terry pursuant to Sect.6213(b),26 U.S.C. Neither notice indicated any statutory reference.(App.G,infra,16a) The back side of said notices stated in part:

> "Please let us know if you believe the balance due is incorrect for reasons other than uncredited payments.Just

return this notice with the correct payment and an explanation to account for the difference.
If you write,please return this notice to help us identify your account.
This notice is not the result of an examination of your return.We notify the taxpayer when we select a return for examination.(App.G,infra,17a)

Bothke complied by responding promptly without set forth statutory reference and thereby abated the unspecified allegation that an error was made on form 1040.(App. H,infra,17a)

Pursuant to 26 U.S.C.,Sect.6213(b)(1) the notice of correction of Arithmetic shall set forth the error alleged and an explanation thereof,which was missing on said notices from the IRS for tax year 1977 and 1979.(App.F,infra 12a. and App. G,infra 16a)

By requesting an abatement the regular provisions of the Revenue Code come into play and a seizure of property can only be imposed following deficiency proceedings. 26 U.S.C. Sect.6213(b)(2)(A) and 713 F 2d at 1412,1413,1414.

On June 3,1981 Racca telephoned Bothke and demanded $ 5,000.oo for tax years 1977 and 1979 or else he would start collection proceedings. Bothke informed Racca,who works out of the same office like Terry,that no official assessment or liability existed for these tax years,and that no statutory notice of deficiency was ever issued for either year,which affords due process protection a proper redetermination by an impartial forum of proper jurisdiction.Racca stated that such deficiency notices had been issued for both tax years.Bothke requested from Racca a copy of said notices to substantiate his claim for such deficiencies.(App.I,infra 21a).

Racca failed to produce the demanded notices of deficiencies for year 1977 and 1979.(entire record.)

Bothke informed Racca that audit proceedings are in progress for tax year 1979,requested by L.Hillhouse a tax technician at the Santa Ana office,and warned Racca

that a civil rights suit will be initiated against him for violations of revenue and constitutional laws and rights thereunder. (App.I,infra, 21a).

Racca under alleged revenue laws initiated a federal tax lien with the Orange County Recorder on Bothke's home for tax year 1977 and 1979 alleged to be in favor of the United States on all property rights belonging to Bothke.(App.K,infra ,23a).

Racca thereby ignored the then in progress audit proceedings and ignored the fact that Bothke's returns relative 1977 and 1979 did not indicate any additional tax owed.

Bothke filed his complaint and an injunction against Racca in the District Court. The injunction was denied.

During the judicial proceedings the IRS as a matter of policy released the tax lien for 1979 from Bothke's property initiated by Racca (App. K,infra 24a) and returned all monies levied by Terry for year 1977 to Bothke.(Tab 35,App. record.)

During the proceedings in District Court Racca failed to file an answer to the complaint and Bothke filed his request for default which the clerk entered.[1] Racca failed to object against the entered default but inspite of this fact the Court by it's own decision set the default aside without good cause shown.(Tab 19,App. record.)[2]

The Court in open court ordered Racca to file an answer to the complaint and directed both parties to file each a motion for summary judgment.(Tab.19,App. record.)

Racca failed to oppose and to object to Bothke's motion for summary judgment and Racca's declarations contain perjured statements and do not measure up to the requirements of Rule 56(e) of F.R.C.P. based on hearsay and perjury.

Inspite of the submitted hearsay and perjury by Racca the District Court by Order dated March 9,1982 held Racca immune from liability for damages under the doctrine of qualified immunity (App.C,infra, 10a)

1/ Rule 12,F.R.C.P. requires to file answer;
2/ Rule 55,F.R.C.P. requires default if requ'd.

but failed to issue a certificate pursuant to 28 U.S.C.A.,Sect.2006 which would certify that probable cause existed for Racca's action and that he had acted under the directions of the Secretary of the Treasury or other government officer.

The record of Bothke v.Terry,supra,and this record demonstrates that Terry and Racca have relied on internal IRS documentation identified as TDA's(Tax payer delinquent accounts).These TDA's have no statutory authority pursuant to the IRS Code nor under any law.The TDA's are not sent to any taxpayer,were not prepared by the defendants, constitute hearsay evidence,and are totally irrelevant to procedural due process requirements pursuant to established law. Racca and Terry admitted that TDA's have no statutory authority and are not sent to taxpayers(Bothke v.Terry ,Admission,and Racca Admissions,Excerpt p.41,Appeals record.)

Racca never saw Bothke's return for year 1977 and 1979 but stated under penalty of

perjury that the alleged taxes were based on Bothke's returns for year 1977 and 1979, which of course do not show tax owed.(Entire record.)

Bothke requested a jury trial which the District Court denied,and the lower Court sanctioned.

The lower Court's memorandum acknowledges the notice of correction of mathematical error pursuant to 26 U.S.C.A.Sect. 6213(a)& (b) for the tax years 1977 and 1979; (App.A,infra,2a) sent to Bothke,and the abatement exception provided by Sect.6213 (b), (App.F,infra,13a) but states that this section does not apply since Racca did not assess the tax,and did not violate Sect. 6213(a).(App.A,infra,5a).

The lower Court in its memorandum also acknowledges the final notice sent to Bothke pursuant to Sect.6331,a condition precedent to the IRS's power to levy on property subject to the lien(App. F,infra, 15a) but also states that a tax lien is not

a levy.(App. A,infra, 5a).

Section 6331 also states:"If any person liable to pay any tax**;" establishing the prerequesite "liability" for the Section to become effective.

The IRS followed proper procedure by accepting Bothke's abatement (App.H,infra,17a) pursuant to Sect.6213(b)(2)(A) by initiating audit proceedings.(App.J,infra, 22a).

A gross and serious error occurred when in fact the lower Court misstated the record in its memorandum as follows:

> "The IRS released the lien three months later before any of Bothke's property had been seized.Bothke then brought this law suit against Racca." (App.A,infra,3a).

The facts in the record contradict the lower Court's finding as set forth below:

June 3,1981- Bothke warned Racca that no tax liability exists and that an audit is in progress.(App.I,infra, 20a).

June 3,1981- Racca initiated the seizure on Bothke's property.(App.K,infra, 23a).

On or about June 5,1981- Bothke received the notice of Federal Tax Lien on his home. (App.K,infra,23a)

On June 10,1981-Bothke filed suit against Racca.(Tab 1,app.record.)

On June 24,1981- Audit took place.

On September 15,1981-The IRS released the Federal Tax Lien from Bothke's property.(App.K,infra, 23a).

On October 12,1981- Subsequent the held Audit,the IRS sent notice to Bothke stating for tax year 1977 and 1979, "Balance Due None." (App.record,Tab 41,p.37,38,Exh.H).

The lower Court failed to address in its memorandum: Racca's made default,perjury, hearsay in Racca's declaration,and seizure of Bothke's property without affording an opportunity to be heard required before a seizure may be effected on Bothke's property,procedural due process requirements pursuant to the Fifth Amendment safeguards.

The lower court ignored the fact that Racca knowingly seized Bothke's property during audit proceedings.(App.I,p.20a).

The lower Court found that:

> "There was no statutory or constitutional violation,and that this is the kind of "insubstantial lawsuit" for which early termination via summary judgment was appropriate." (App.A,infra,p.7a).

REASON FOR GRANTING THE PETITION.

The reasons for granting the petition are twofold:

This instant case like the case Bothke v.Terry,713 F 2d 1405,brought before this Court in Terry v.Bothke,83-1506,subject to the same facts and law as in this present case and disposed of in light of Davis v. Scherer,supra,raises again the important issue: Whether the violations of Revenue Code Statutes and Constitutional rights abrogate a low level revenue officer's claimed qualified immunity to a suit claiming damages for statutory and constitutional violations? When in fact the revenue

officer had seized property in violation of clearly established due process rights guaranteed under the Internal Revenue Code, 26 U.S.C.,provisions,Sect.6211,6212,6213, 6321,6322 and 6331,and the Fifth Amendment by circumventing clearly defined congressional safeguards and procedural rights and overstepping his ministerial authority and duties.

The construction of the decision by the District Court in Bothke v.Terry,supra, collateral to this action,like the decision of the appeals court herein(App.A,infra, p.1a)that seizure of property without due process and without assessed liability does not violate constitutional and statutory rights and that termination via summary judgment was appropriate on the ground of qualified immunity as set forth by this Court in Harlow v.Fitzgerald,457 US. 800, and Davis v.Scherer,supra,is clearly erroneous;because such decision had already significant adverse impact upon the per-

formance and conduct of this defendant Racca, who had learned of Terry's declared immunity from liability by working in the same office and then committed the same or worst violation causing the filing of this lawsuit, when he seized unlawfully property during a clearly established revenue agency adjudication process, specifically an audit in progress; in violation of the Rule established in Stankevitz v.I.R.S., 640 F2d 205 (9th Cir.1981) and Bothke v.Terry, supra, at 1413 & 1414.

The second reason for granting this petition is set forth on the grounds of Rule 17 (1)(c) of this Court:

> "When a Federal Court of Appeals has rendered a decision in conflict with the decision of another federal court of appeals on the same matter; or has so far departed from the accepted and usual course of judicial proceedings; or so far sanctioned such departure by a lower court, as to call for an exercise of this Court's power of supervision;

which in this case is desperately required on the grounds that the lower court's de-

cision set forth in App.A,infra,p.1a,is in conflict with all its own decisions,with other appeals court's decisions,has departed from the accepted course of judicial proceedings,has sanctioned such departure by a lower court which stands the constitution on its head and urgently requires this Court's power of supervision,also due to the grave errors in the lower court's memorandum which if even accepted as true finds no support in any law or fact.

1. The decision by the lower court is so palpable bad and necessitates an inspection of the same:

The court therein acknowledged in fact the existence of a notice of correction of mathematical error for both tax years 1977 and 1979 invoking thereby the jurisdiction of Section 6213(b)(1)(2),26 U.S.C. subject to levy and seizure.(App.F,infra,p.13a & 14a, and App.A,p.2a)

On page 3a,App.A,the court also acknowledged in fact that a final notice

was sent to Bothke by Racca,similar to the collateral case Bothke v.Terry,pursuant to Section 6331(d) again invoking jurisdiction subject levy and seizure,a condition required precedent to the IRS's power to levy on property.The court thereby ignored the second condition to be fullfilled for seizure to be lawfull specifically,a taxpayer "must be liable"for the tax a condition precedent to demand,because merely demanding payment,as Racca did,even repeatedly does not cause liability.Bothke v.Terry,at1414, Schmidt v.C.I.R.,272 F 2d 423(9th Cir.1959) American Acc.Corp.v.US,550 F 2d 1220(9th Cir.1977) Fendler v.C.I.R.,441 F 2d 1101 (9th Cir,1971) Bromberg v.Ingling,300 F 2d 859 (9th Cir.1962); Additionally the court on page 5a,App.A,states that a lien is not a levy;and that a levy does not occur until the IRS exercises seizure over property subject to the lien.(6331(b) Thereby again invoking the jurisdiction of levy and seizure,

but implying that a lien on property is not a seizure, totally in conflict with applied standards and authorities.1/ Because in fact the language in the revenue Code Sections: 6213,6321,6322 & 6331(App.F,infra,p.10a,11a, 12a,)subject Lien and Levy, speak all of an established liability;"If Any Person Liable", absent in this case,but a prerequesite to declare and establish a deficiency under section 6211 and 6212(App.E,infra,p.12a)constituting a proposed assessment providing procedural due process with applicable restrictions relative seizure(6213,26 U.S.C.) in harmony with the provided and defined safeguards of due process under the Fifth Amendment,which Racca inspite of Bothke's warning and the lower Court totally ignored.(App.I, infra,p. 18a).

1/ Judicial authorities established that: ALien is a claim and liability on property for payment of debt;Shipley v.Metrop.LifeIns. Co.,25 Tenn.App.452,158 SW 2d 739;Fairbanks Morse & Co. v.Cape Charles,144 Va 56,131 SE 437,439; A Lien is Levy made on tax assessment, City of Salem v.Marion County,171 Or.254,137 P 2d 977; Gillespi v.Board of Superv's of Broome County,36 NYS 2d 853,178 Misc.890. In absence of Bothke's owed tax liability and in

The lower court's confusion in its memorandum (App.A,infra) relative to this present case is clearly demonstrated by invoking several times the applicable jurisdiction and defined restriction thereunder subject levy and seizure set forth in the record and herein,and recognizing that no tax liability nor notice of deficiency existed,and then falsely declaring that even if such notice were required Racca's conduct would not have violated Sect.6213(a) because he did not assess the tax,which in fact did not exist;Specifically when in fact Racca filed knowingly a tax lien(App.A,p.3a; App.K,p.23a) during IRS Audit proceedings (App.J,p.22a) and then additionally the memorandum implies that Racca's conduct does not constitute statutory and constitutional

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light of the above set forth authorities the decision below becomes the advocate for Racca,by ignoring the none-existing tax liability of Bothke and the falsely alleged claim by Racca under revenue Code sections and under color of law,unjustifiable under law and fact. (App.K,infra,p. 23a)

violation.(App.A,p.7a) The confusion of the lower court is also demonstrated in light of the facts in the record that:

(a) Racca involved himself in Terry's Levy (app.K,p.23a) which is subject to the same issues of fact and law.Bothke v.Terry,supra.

(b) Bothke was compelled to file suit for the release of the unlawfully seized property,establishing legal injury and damages.

(c) A Lien can only be lawfully executed when liability under Section 6213,6321,6322, and 6331,26 U.S.C. exists,which was absent in this case.

(d) The IRS did not violate its procedures by accepting Bothke's filed abatement(App. H,infra,p.17a) and scheduled an Audit which was in progress,when Racca informed of the audit willfully seized in part Bothke's property without justification in law and fact.(App.J,p.22a).

Ignoring none existing liability and assessment and circumventing invoked judicial restrictions based on due process

(App. E,F,G,H,J) and the Fifth Amendment, constitutes a fatal error by the lower court in conjunction with its misstated record that Bothke brought suit after the lien was released and before property was seized in part,when in fact the property was seized in part before the suit was lodged and was released during the proceedings in the District court establishing Bothke's legal injury in fact by Racca's unlawful conduct.

It must be realized that under the first principle of the law,an act or omission is either lawful or unlawful,and the low level revenue officer's ill founded immunity arguments sanctioned illegally by the lower court are clearly without merit under the equal protection of the law.

2. In light of this Court's summary disposition in Terry v.Bothke,83-1506,involv - ing the same facts and law as in this present case,and in light of the established doctrine in Harlow v.Fitzgerald and Davis

v.Scherer, supra, the resolution in this case based on the examination, relevant claimed qualified immunity by low level revenue officers, rests solely on the following circumstances and facts:

(a) Whether Bothke's rights were clearly established under the law at the time of Racca's conduct in issue?

(b) Whether Racca is a public official suject to discretionary function or a low level revenue officer subject to ministerial function?

(c) Whether Racca's conduct in issue was unreasonable under the applicable standard measured by reference to clearly established law?

(d) Whether the revenue Code is constitutional OR unconstitutional? and

(e) Whether Bothke seeks review for statutory and constitutional rights violations?

Relative examination (a) there can be no dispute that Section 6211, 6212, 6213, 6321, 6322 and 6331 (App.E and F, p.12a) of the

I.R.Code,26 U.S.C. provide precisely defined language for the protection of taxpayers and revenue officers rights alike, and constitute clearly established rights in protection of Bothke's property rights.

In conjunction therewith,the language in the Fifth Amendment can neither be disputed,guaranteeing Bothke due process rights before executed seizure on his property.

Simple inspection of the record resolves examination (b) by demonstrating that Racca is a low level revenue officer,not a public official,and is subject to ministerial functions in light of the precise language in the herein set forth revenue code sections and the Fifth Amendment's safeguards.Bothke v.Terry,at 1413.Accordingly Racca does not meet the qualification under the Harlow standard.(Davis v.Scherer at p.12&13,footnote)

In light of the clearly defined and established law as set forth herein,the Rev.Code Sections and the Fifth Amendment,Racca's

conduct, seizing Bothke's real estate property in part, without established liability and without due process during an IRS Audit proceeding, when in fact Racca was fully informed thereof, is totally unreasonable under the applicable revenue standards, Stankevitz and Bothke v. Terry, supra, and clarifies examination (c).

Under examination(d) there exists no dispute that the revenue code in harmony with the Fifth Amendment's safeguards constitute constitutional law determined by Congress.

Under examination (e)the record demonstrates beyond any doubt that Bothke seeks review for statutory and constitutional rights violations(Entire record.)

Not only the opinion in Davis v. Scherer, but also the in part dissenting opinion therein totally supports Bothke's position.

The decision below contains grave errors and collides with the established rules

and doctrine set by this Court and will cause legal chaos,if not corrected,and equal rights violations by applying conformance with the law only selectively in favor of revenue officers,with justice being blind,contrary to this Court's established doctrine in US.v.Cumming,Ct.Cl.9S.Ct.538,130 US 452, 32 L Ed 1029 holding:

> "If collectors***and other revenue officers did nothing more than the law authorized them to do,neither they nor the government would be liable in damages;while,if they acted illegally they would be personally liable in damages,not the government."

confirmed in Sostre v.McGinnis,(C,A.2,1971) 442 F 2d 178,cert.den.404 US 1049,30 L.Ed 2d 740,92 S.Ct.719 cert,den.405 US 978, By stating:

> "Liability under Civil Rights Act for damages is entitrely personal in nature and is intended to be satisfied out of individuals own pocket."

In view of this Court's established doctrine the violation of statutory and constitutional provisions as set forth hereinabove abrogate a revenue officer's claimed qualified immunity to a constitutional da-

mage suit and the court of appeals contrary conclusion in this case should be disapproved.

3. This suit marks the second time, subsequent the decision in Bothke v.Terry, committed gross violations of Local District Court Rules, and Federal Rules of Civil Procedure by revenue officers, Terry and Racca to which Bothke unlawfully was subjected to including committed perjury. These violations were totally ignored by all courts involved, inspite of being fully informed thereof, and in light of the court member's sworn oath of office to uphold the laws of the United States, it can hardly be called an oversight that none of these set forth violations were ever addressed by the involved members of these courts, when in fact numerous volumes of cases in law libraries prove as evidence that none conformance with those rules and violations of the same as set forth in this case and Bothke v.Terry, were fatal to succesful litigation to the violators in these suits.

In accordance with the guaranteed constitutional equal protection of the law this honorable Court's power of supervision, as the highest court in this Nation, is urgently required hereby to restore confidence of the people in the trust and integrety in our judicial system and their keepers.

CONCLUSION.

The petition for a writ of certiorari should be granted and then disposed of in light of Davis v.Scherer, quoting Harlow v. Fitzgerald and Wood v.Strickland, 420 US 308 (1975) at p.6, requiring resolution by Jury subject good faith a question of fact, as done by this Court in Terry v.Bothke.

Respectfully submitted,

DATED: ~~December 17, 1984,~~ JANUARY 5, 1985

Petitioner.
Hans Bothke.

APPENDIX A

NOT FOR PUBLICATION

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

HANS BOTHKE, Plaintiff-Appellant

v.

ERNEST L.RACCA, Defendant-Appellee.

Filed December 27 1983, P.B.Winberry

Clerk U.S. Court of Appeals.

NO: CA 82-5285/ DC NO: 81-2857 CBM

MEMORANDUM **

Appeal from the United States District Court for the Central District of California. The Honorable Consuela B.Marshall, District Judge,presiding,submitted August 3,1983. *

BEFORE:BARNES,WALLACE and CANBY,Circuit

** The panel has concluded that the issues predented by this appeal do not meet the standards set by rule 21,of the rules of this Court for disposition by written opinion. Accordingly,it is ordered that disposition be by memorandum,foregoing publication in the Federal Reporter and that this memorandum may not be cited to or by the courts of this circuit save as provided in Rule 21(c).

Judges.

Bothke appeals from a summary judgment for defendant Racca,an IRS agent.Bothke contends that the filing of a Notice of Federal Tax Lien without the issuance of a prior notice of deficiency violated his statutory and constitutional rights.He seeks $ 350,000 in compensatory and punitive damages.

Bothke's 1977 and 1979 income tax returns contained deductions of $ 7,560 and $ 8,760, respectively,as "Support for the production of Income." The returns also listed "reductions" of Income,from $ 10,819.87 to $ 1,568.10 in 1977 and from $ 11,822.07 to $ 1,390.83 in 1979.

On March 5,1979,a notice of correction of mathematical error with respect to the 1977 tax was sent to Bothke,assessing him $ 2,762 in additional taxes. On August 11,1980

* The panel finds this case appropriate for submission without argument pursuant to 28 U.S.C.A.,9th Circ.R.3(a) and Fed.R.App. R.34(b).

a similar notice was sent to Bothke with respect to the 1979 tax year,assessing him an additional $ 1,621.

Bothke refused to pay the additional taxes and the case was turned over to Racca for collection. On June 3,1981,Racca filed a Notice of Federal Tax Lien against all the real and personal property of Bothke in order to perfect the lien granted in favor of the United States by I.R.C. Para.6321.

On the next day,Racca mailed Bothke a "Final Notice" which is required by I.R.C. Para.6331(d) as a condition precedent to the IRS's power to levy on property subject to the lien.At the same time,Racca also sent Bothke a copy of the Notice of Federal Tax Lien.The IRS released the Lien three months later before any of Bothke's property had been seized. Bothke then brought this lawsuit against Racca.

The District Court granted summary judgment in favor of Racca on the ground that he was entitled to qualified immunity and that there

had been no showing of bad faith.

In earlier case involving this same plaintiff,we held that an IRS agent is not entitled to absolute immunity when he seeks to enforce payment of unpaid taxes by levying on the property of the taxpayer. Bothke v.Fluor Engineers and Constructors Inc. 713 F 2d 1405,1412-13 (9th Circ.1983).

However,we said that the IRS agent would be entitled to qualified immunity if he met the objective good faith test of Harlow v. Fitzgerald, 102 S.Ct.2727(1982);Fluor Engineers,713 F 2d at 1414.

Under that test,we must determine whether Racca's conduct was objectively reasonable "as measured by reference to clearly established law." Harlow,102 S.Ct.at 2739.

Bothke contends that Racca's conduct was not reasonable because no notice of deficiency had been sent to him as required by IRC. Para.6213(a). Section 6213(a) prohibits the assessment of a tax and any levy or proceeding in court to collect it prior to and

within 90 days,or 150 days in some cases,after the mailing of a notice of deficiency to the taxpayer.I.R.C.Para.6213(a).

No notice of deficiency was ever mailed to Bothke with respect to either year. Nevertheless,Racca argues that none was required under the exception to the notice requirement provided by I.R.C.Section 6213(b). We do not have to decide,however,whether the exception in Section 6213(b) applies in this case because even if a notice of deficiency were required,Racca's conduct would not have violated section 6213(a). He did not assess the tax about which Bothke complains.Rather, Bothke's complaint with Racca stems from the latter's filing of a tax lien against Bothke's property.

However,section 6213(a) does not make a notice of deficiency a condition precedent to the filing of a tax lien. The filing of a tax lien is not a"levy or proceeding in court" to collect a tax.A levy does not occur until the IRS exercises its power of

"distraint and seizure" over property subject to the lien.I.R.C.sect.6331 (b). It is effected by issuing a Notice of Levy to a person in possession of property subject to levy.Treas.Reg.Sect.301.6331-1(a)(1).

If there was no seizure,there was no statutory violation.Similarly,there could be no constitutional violation either. See Fuentes v.Shevin,407 U.S. 67,80-81(1972) (notice and opportunity to be heard required before seizure may be effected.)

Because Racca did not levy against any of Bothke's property,this case is distinguishable from Fluor Engineers,where we remanded the determination of the agent's good faith to the District Court because we determined that the IRS had acted illegally in proceeding under the exception in section 6213(b). 713 F 2d at 1414-15. In that case,the IRS agent had actually sent a Notice of Levy to Bothke's employer and had seized $ 3,415.43 in wages under the levy.Id.at 1408.

Consequently, there was no question that the IRS agent's action violated section 6213(a).

Because Racca's action of filing a tax lien did not violate section 6213(a), nor any of Bothke's constitutional rights, this kind of "insubstantial lawsuit" for which early termination via summary judgment was appropriate. See Harlow, 102 S.Ct. at 2733. AFFIRMED. 1/

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT COURT

HANS BOTHKE, Plaintiff-Appellant,

v.

ERNEST L. RACCA, Defendant-Appellee.

NO: 82-5285

ORDER

BEFORE: BARNES, WALLACE AND CANBY, Circuit judges.

The panel as constituted above has voted unanimously to deny the petition for rehearing and suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc and no judge of the court has requested a vote on it.

The petition for rehearing is hereby denied and the suggestion for rehearing en banc is rejected.

Filed September 26,1984.

P.B.Winberry,Clerk U.S.Court of Appeals.

APPENDIX C

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

HANS BOTHKE, Plaintiff,

v.

ERNEST L.RACCA, Defendant.

NO: CV 81-2857 CBM (JR)

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Court makes the following findings of fact and conclusions of law:

FINDINGS OF FACT

1. Defendant is a revenue officer employed

by the Internal Revenue Service.

2. Defendant received two Taxpayer Delinquency accounts with respect to the income tax liability of plaintiff. These Taxpayer Delinquency Accounts indicated that there were unpaid taxes with respect to the years 1977 and 1979. The taxpayer delinquency accounts also indicated that the assessments upon which these unpaid taxes were based were determined from the federal individual income tax returns as filed by plaintiff.

3. Defendant requested payment from plaintiff and plaintiff refused to pay.

4. Defendant did place a tax lien on plaintiff's home.That lien was subsequently removed by defendant.

5. The filing of the tax lien was performed in the course and scope of defendant's employment in the good faith belief that said action was authorized by the Internal Revenue Code.

6.Any finding of fact deemed a conclusion

of law is hereby incorporated in the conclusions of law.

CONCLUSIONS OF LAW

1. This Court has jurisdiction of the parties to this action.
2. There is no genuine issue as to any material fact.
3. As a federal official who in good faith undertook enforcement proceedings which were within his scope of authority, defendant is immune from liability under the doctrine of qualified immunity. Butz v. Economou, 438 US 478 (1978); Clifton v. Cox, 549 F 2d 722 (9th Circ. 1977).
4. Summary Judgement should be entered in favor of the defendant and against the plaintiff, and the action should be dismissed.
5. To the extent these Conclusions of Law also contain Findings of Fact, they shall be deemed incorporated within the Findings of Fact. DATED: 3/5/82

signature

Consuela B. Marshall, Judge, U.S. District Court. Filed March 5, 1982.

APPENDIX D.

UNITED STATES DISTRICT COURT FOR CENTRAL DISTRICT OF CALIFORNIA

HANS BOTHKE, Plaintiff,

v.

ERNEST L. RACCA, Defendant.

NO: CV 81-2857 CBM (JR)

JUDGMENT.

IT IS ADJUDGED that the plaintiff's motion for summary judgment is denied, the defendnat's motion for summary judgment is granted, and the action is dismissed on the merits.

DATED: 3/5/82.

signature

Consuela B. Marshall

U.S. District Judge.

Entered March 5, 1982.

APPENDIX E

I.R.CODE,1954,TITLE 26,U.S.C. (STATES IN PART)

SECTION 6211. Definition of a deficiency.

(a) In general.

For purposes of this title in the case of income,estate,and gift taxes imposed by subtitles A and B and excise taxes imposed by chapters 41,42,43,44 and 45,the term "deficiency" means the amount by which the tax imposed by subtitle A or B,or chapter 41,42,43,44 or 45 exceeds the excess of:

(1) the sum of

(A) the amount shown as the tax by the taxpayer upon his return,if a return was made by the taxpayer and an amount was shown as the tax by the taxpayer thereon;

SECTION 6212 Notice of deficiency.

(a) In general.

If the Secretary determines that there is a deficiency in respect of any tax imposed by subtitle A or B or chapter 41,42 43,or 44 he is authorized to send notice of such deficiency to the taxpayer by certified mail or registered mail.

APPENDIX F

Internal Revenue Code of 1954 (26 U.S.C. (& Supp. V)):

Section. 6213. Restrictions applicable to deficiencies; petition to Tax Court.

(a) Time for Filing Petition and Restriction on Assessment.

Within 90 days, or 150 days if the notice is addressed to a person outside the United States, after the notice of deficiency authorized in section 6212 is mailed (not counting Saturday, Sunday, or a legal holiday in the District of Columbia as the last day), the taxpayer may file a petition with the Tax Court for a redetermination of the deficiency.

Except as otherwise provided in section 6851 or section 6861 no assessment of a deficiency in respect of any tax imposed by subtitle A, or B, chapter 41, 42, 43, 44, or 45 and no levy or proceeding in court for its collection shall be made, begun, or prosecuted until such notice has been mailed to the taxpayer, nor until the expiration of such 90-day or 150-day period, as the case may be, nor, if a petition has been filed with the Tax Court, until the decision of the Tax Court has become final. Notwithstanding the provisions of section 7421(a), the making of such assessment or the beginning of such proceeding or levy during the time such prohibition is in force may be enjoined by a proceeding in the proper court.

(b) Exceptions to restrictions on assessment.

(1) Assessments arising out of mathematical or clerical errors.

If the taxpayer is notified that, on account of a mathematical or clerical error appearing on the return, an amount of tax in excess of that shown on the return is due, and that an assessment of the tax has been or will be made on the basis of what would have been the correct amount of tax but for the mathematical or clerical error, such notice shall not be considered as a notice of deficiency for the purposes of subsection (a) (prohibiting assessment and collection until notice of the deficiency has been mailed), or of section 6212(c)(1) (restricting further deficiency letters), or of section 6512(a) (prohibiting credits or refunds after petition to the Tax Court), and the taxpayer shall have no right to file a petition with the Tax Court based on such notice, nor shall such assessment or collection be prohibited by the provisions of subsection (a) of this section. Each notice under this paragraph shall set forth the error alleged and an explanation thereof.

(2) Abatement of assessment of mathematical or clerical errors

(A) Request for abatement.

Notwithstanding section 6404(b), a taxpayer may file with the Secretary within 60 days after notice is sent under paragraph (1) a request for an abatement of any assessment specified in such notice, and upon receipt of such request, the Secretary shall abate the assessment. Any reassessment of the tax with respect to which an abatement is made under this subparagraph shall be subject to the deficiency procedures prescribed by this subchapter.

(B) Stay of collection.

In the case of any assessment referred to in paragraph (1), notwithstanding paragraph (1), no levy or proceeding in court for the collection of such assessment shall be made, begun, or prosecuted during the period in which such assessment may be abated under this paragraph.

Section 6321. Lien for taxes.

If any person liable to pay any tax neglects or refuses to pay the same after demand, the amount (including any interest, additional amount, addition to tax, or assessable penalty, together with any costs that may accrue in addition thereto) shall be a lien in favor of the United States upon all property and rights to property, whether real or personal, belonging to such person.

Section 6322. Period of lien.

Unless another date is specifically fixed by law, the lien imposed by section 6321 shall arise at the time the assessment is made and shall continue until the liability for the

amount so assessed (or a judgment against the taxpayer arising out of such liability) is satisfied or becomes unenforceable by reason of lapse of time.

* * * * *

Section 6331. Levy and distraint

(a) Authority of Secretary.

If any person liable to pay any tax neglects or refuses to pay the same within 10 days after notice and demand, it shall be lawful for the Secretary to collect such tax (and such further sum as shall be sufficient to cover the expenses of the levy) by levy upon all property and rights to property (except such property as is exempt under section 6334) belonging to such person or on which there is a lien provided in this chapter for the payment of such tax. Levy may be made upon the accrued salary or wages of any officer, employee, or elected official, of the United States, the District of Columbia, or any agency or instrumentality of the United States or the District of Columbia, by serving a notice of levy on the employer (as defined in section 3401(d)) of such officer, employee, or elected official. If the Secretary makes a finding that the collection of such tax is in jeopardy, notice and demand for immediate payment of such tax may be made by the Secretary and, upon failure or refusal to pay such tax, collection thereof by levy shall be lawful without regard to the 10-day period provided in this section.

* * * * *

APPENDIX G

DEPARTMENT OF THE TREASURY

Internal Revenue Service Center

P.O.Box 12586,Fresno,CA 93778, August 11, 1980 Date of this Notice

FA 565 90 6893 30 7912 670 8031

Hans Bothke 400 S Flower # 156,Orange,CA 92668. CORRECTION TO ARITHMETIC

In checking the arithmetic on your income tax return,we had to make corrections for the reasons shown below.

An error was made on line 35,Form 1040,in reporting the tax from the tax tables.

Document locator number:95221-125-09639-0

Form Number 1040,Year ended Dec.31,1979

Balance Due BY: Aug 21,1980

Tax Statement

Correct Balance of tax on return:	1,561.00
Plus Interest:	60.56
Balance due IRS:	1,621.56

Code Number 09 (Back side states in part)

Interest as provided by law is figured from the due date of the return to the date of

full payment or the date of this notice. Please let us know if you believe the balance due is incorrect for reasons other than uncredited payments. Just return this notice with the correct payment and an explanation to account for the difference.

*** If you write,please return this notice to help us identify your account.***

This notice is not the result of an examination of your return.We notify the taxpayer when we select a return for examination.

APPENDIX H.

(Response to appendix G)

Hans Bothke,400 S.Flower #156,Orange,CA 92668. Certified U.S.Mail No: P02 9207212

TO: Internal Revenue Service,P.O.Box 12586
Fresno,CA 93778 August 26,1980

RE: Your Notice Doc.Loc.No:
95221-125-09639-0

I hereby object to your unexecuted document as identified above,as pursuant to statutory

and common law,the document has no operating effect,but subjects me to duress.
I hereby appeal from and deny your unspecified allegation that an error was made on line 35 on form 1040. Should my voluntary assessment on form 1040 be not acceptable to you,please issue to me an official statutory notice of deficiency pursuant to section 6212(a) of Title 26 U.S.C.,that a redetermination can be obtained from a court of proper jurisdiction.

Yours truly, signature- Hans Bothke.

APPENDIX I

(Warning letter to Racca)

Hans Bothke,400 S.Flower #156 Orange,CA 92668 June 3,1981. U.S.certified mail No: P06 9516708 TO: Ernest L.Racca, Revenue Officer,Internal Revenue Service, Santa Ana,CA 92712, 34 Civic Center Plaza Room 212,P.O.Box C-12699.

RE: Your Demand for $ 5,000.00 relative to my tax matters for the years

1977 and 1979.

In conformance of your telephone conversation on June 3,1981 please be advised of the following,relative to your above listed demand:

1. Relative to my 1977 tax matters,the record shows that no statutory Notice of Deficiency that an assessment will be made, pursuant to Title 26 U.S.C.,section 6212(a) exists.

2. Such statutory notice of deficiency for the year 1977 was requested by me from the IRS on January 28,1980.

3. To date,I have not received the requested statutory notice of deficiency for the year 1977.

4. A Freedom of Information Act request failed to reveal the existence of such notice for the year 1977.

5. Procedural due process requires a statutory notice of deficiency to be issued or sent to the taxpayer to guarantee the taxpayer a redetermination before a judicial

tribunal of proper jurisdiction before any lien or levy on my property can be executed pursuant to section 6213(a) of Title 26 U.S.C..

6. I Have also informed you about the facts that my 1979 tax matters are currently prepared for an audit demanded by L.Hillhouse, tax technician,at the Santa Ana Office.

7. Be also informed that for the year 1979 I had requested a statutory notice of deficiency should my voluntary assessment on my return be not acceptable,that a redetermination can be obtained from a court of proper jurisdiction.

8. To date,I did not receive the requested statutory notice of deficiency for the year 1979;and your threatening to place a lien or to levy my property constitutes a violation of my rights. For the foregoing reasons your demand for $ 5,000.00 has no statutory authority and constitutes pursuant to law an extortion attempt in violation of section 7214,Title 26 U.S.C. and in

violation of the appropriate section of the California Penal Code,and furthermore a violation of my civil rights to procedural due process as guaranteed to other tax payers pursuant to the Fifth Amendment to the U.S. Constitution. Your action to levy my property shall compell me to file a criminal complaint and a civil rights suit against you for the damages caused by your unlawful conduct. To substantiate your statement that a statutory notice of deficiency has been issued and sent to me by the IRS for the years 1977 and 1979,please forward a copy of the Statutory notice of deficiency for the tax year 1977 and 1979 to me. Your failure to comply with this request shall constitue that no tax liability exists for the years 1977 and 1979. Sincerely,signature

Hans Bothke,attorney pro se.

(App.Record,Tab 41,page 26,27,Exh.B)

APPENDIX J

Internal Revenue Service-District Director
TA 201 Department of the Treasury
Date: 5/15/81 Tax Year 12/31/79,Appointment
Clerk P.Williams,L.Hillhouse.
Hans Bothke,400 S.Flower #156,Orange ,CA
92668. We are examining your federal income tax return for the above year and we find we need additional information to verify your correct tax.Please call us at the above telephone number within 10 days to set up an appointment convenient for you.
About the records needed to examine your return- We would appreciate your bringing to our office the records you used as a basis for the items checked at the end of this letter so we can discuss them with you.
(statement in part,) Sincerely yours,

signature

W.A.Connett,District Director.
(App. Record,tab 41,page 33,34,Exh.G)
Form 4564 Information Document Request.

Subject:1979 Tax Audit. Hans J.Bothke.
Description of Documents requested:
(Listing 8 categories of documents)
Name and Title of requester:L.Hillhouse,
tax technician,Office Santa Ana,TA 201
Date:5/15/81.
(App. Record,tab 41,page 35,Exh.G)

APPENDIX K.

Form 668 Department of the Treasury,IRS.
District Los Angeles, Serial No: 95-25-1617
NOTICE OF FEDERAL TAX LIEN UNDER I.R.LAWS
As provided by sections 6321,6322 and 6323 of the Internal Revenue Code,notice is given that taxes(including interest and penalties)have been assessed against the following named taxpayer,Demand for payment of this liability has been made,but it remains unpaid.Therefore,there is a lien in favor of the United States on all property and rights to property belonging to this taxpayer for the amount of these taxes, and additional penalties,interest,and costs

that may accrue. Hans Bothke,S.Flower #156 Orange,CA 92668. ID No: 565-90-6893 Tax: 1040; Period ended: 7712; Date of assessment: 3-5-79; Unpaid balance: $ 2,762.44; Tax: 1040; Period ended: 7912; Date of assessment: 8-11-80; Unpaid balance: $ 1,621.56; Orange County Recorder,Santa Ana Total: $ 4,384.00.

This Notice was signed and prepared at Santa Ana,on this 3rd day of June 1981.

Signature, R.L.Racca,revenue officer.

(App.Record,tab 41,page 28,Exh.C)

* * * *

Form 668 CERTIFICATE OF RELEASE OF FEDERAL TAX LIEN.

Serial No; 95-25-1617 11438

(The following is the same as set forth in the above notice.)

This Notice was prepared and signed at Los Angeles,CAlifornia on this 15th day of Sept. 1981. signature, Chief,Technical Advisory Unit. (Not signed by Racca)

(App.Record,tab 37,page 13,Exh.F.)

* * * *

Office - Supreme Court, U.S.
FILED
APR 8 1985
ALEXANDER L. STEVAS
CLERK

No. 84-1109

In the Supreme Court of the United States

OCTOBER TERM, 1984

HANS BOTHKE, PETITIONER

v.

ERNEST L. RACCA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

REX E. LEE
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

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In the Supreme Court of the United States

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HANS BOTHKE, PETITIONER

v.

ERNEST L. RACCA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

Petitioner challenges the court of appeals' holding that respondent, an IRS revenue officer, was entitled to qualified immunity for his action in filing a Notice of Federal Tax Lien against petitioner's property.

1. On his federal income tax return for 1977, petitioner claimed a deduction in the amount of $7,560 as "Support for the production of Income," and also claimed a "reduction of income" in the amount of $9,250 (Pet. App. 2a). Neither of these deductions is cognizable under the Internal Revenue Code.[1] Pursuant to Section 6213(b)(1) of the Code, the Commissioner on March 5, 1979, sent petitioner a "notice of correction of mathematical error." That notice informed petitioner that a tax deficiency in the

---

[1]Unless otherwise noted, all statutory references are to the Internal Revenue Code of 1954 (26 U.S.C.), as amended (the Code or I.R.C.).

amount of $2,762 had been assessed against him for 1977, "on the basis of what would have been the correct amount of tax but for" his mathematical or clerical mistake (I.R.C. § 6213(b)(1)). Petitioner claimed similar deductions on his 1979 return and, on August 11, 1980, the IRS sent him another notice of correction of mathematical error, assessing a deficiency in the amount of $1,621 for 1979 (Pet. App. 2a-3a). The IRS did not send petitioner a statutory "notice of deficiency" before assessing the additional tax for either year.[2]

Petitioner refused to pay the assessments and the case was assigned to respondent Racca, an IRS revenue officer, for collection. On June 2, 1981, Racca received in the normal course of his duties Taxpayer Delinquency Accounts (TDAs) covering petitioner's 1977 and 1979 tax years; these documents indicated that assessments had been made against petitioner for each year on the basis of returns filed by him (CR 45, at 1).[3] The next day, Racca filed a Notice of Federal Tax Lien against petitioner's property in order to perfect the lien granted in favor of the United States by Section 6321 of the Code. Respondent mailed petitioner a copy of that Notice and also sent him a "Final Notice" that is required before the IRS may levy on property subject to a tax lien. Pet. App. 3a.

---

[2]Section 6213(a) of the Code generally requires the IRS to send the taxpayer a "notice of deficiency" (defined in Section 6212) before assessing a deficiency in tax or commencing action to collect a deficiency. Section 6213(b), however, sets forth an exception to this rule in the case of mathematical or clerical errors, providing that a notice of correction of such errors "shall not be considered as a notice of deficiency" and that assessment in such cases is not subject to the restrictions of Section 6213(a).

[3]"CR" refers to the docket control number assigned to documents in the original record by the clerk of the district court.

Petitioner brought this action against respondent in the United States District Court for the Central District of California, contending that the IRS had erred in failing to send him a notice of deficiency before making the two assessments. Petitioner sought damages and an injunction against collection of the assessed taxes. The injunctive aspects of the suit were dismissed after the IRS released the tax lien (CR 1, 34). The district court granted summary judgment for respondent on the damages aspects of the suit, concluding that his actions were protected by qualified immunity (Pet. App. 8a-11a). The court found that Racca had acted within the scope of his employment and that petitioner had made no showing that Racca's action in filing the notice of tax lien evidenced bad faith (*ibid.*).[4]

The court of appeals affirmed in an unpublished memorandum (Pet. App. 1a-7a). It found no need to decide whether the errors on petitioner's tax returns were properly to be characterized as "mathematical or clerical errors," in which case the mailing of a notice of deficiency would not have been required before the assessments were made (*id.* at 5a, citing I.R.C. § 6213(b)). Even if the "mathematical error" exception did not apply, the court noted, Section 6213(a) in terms makes the mailing of a notice of deficiency a condition precedent only to the "assessment of a deficiency" or the commencement of a "levy or proceeding in court for its collection" (Pet. App. 5a, citing I.R.C. § 6213(a)). Respondent Racca, the court observed, neither assessed a deficiency against petitioner nor levied against his

---

[4]W.J. Terry, another revenue officer, levied on Bothke's property to collect the 1977 tax liability, and Bothke also brought suit for damages against Terry. The court of appeals in that case reversed an award of summary judgment in Terry's favor. *Bothke* v. *Fluor Engineers & Constructors, Inc.*, 713 F.2d 1405 (9th Cir. 1983). In *Terry* v. *Bothke*, No. 83-1506 (July 2, 1984), this Court summarily vacated the court of appeals' decision in that case and remanded for further consideration in light of *Davis* v. *Scherer*, No. 83-490 (June 28, 1984).

property, but simply filed a Notice of Federal Tax Lien, an action that effected no seizure of petitioner's belongings. The court of appeals accordingly concluded that respondent's conduct "did not violate section 6213(a), nor any of [petitioner's] constitutional rights," and that petitioner's lawsuit was "th[e] kind of 'insubstantial lawsuit' for which early termination via summary judgment was appropriate" (Pet. App. 7a, quoting *Harlow* v. *Fitzgerald*, 457 U.S. 800, 819 n.35 (1982)).

2. The decision below is plainly correct. It is well established that "government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow*, 457 U.S. at 818. Even if one were to assume that the IRS relied incorrectly on the "mathematical error" exception, and hence that it mistakenly failed to send petitioner a notice of deficiency before making the challenged assessments, that mistake would not establish a violation of any statutory or constitutional right *by respondent*. Respondent did not assess the deficiencies; his conduct consisted solely of filing a notice of tax lien in the appropriate public records office. And even if, contrary to the court of appeals' holding, petitioner could show that respondent had violated some statutory provision, respondent plainly was not shown to have violated any "clearly established * * * right[] of which a reasonable person would have known" (*Harlow*, 457 U.S. at 818). Because respondent was not responsible for assessing the deficiencies, and because the TDAs that he received through IRS channels contained no suggestion that the assessments were deficient, it was entirely reasonable for him in the exercise of his tax-collection duties to proceed on the assumption that the assessments were valid. As this court recently held, government employees sued for constitutional violations do not "lose their qualified immunity

merely because their conduct violates some statutory * * * provision." *Davis* v. *Scherer*, No. 83-490 (June 28, 1984), slip op. 10 (footnote omitted).

Petitioner's contention (Pet. 23-28) that he was entitled to a jury trial on the issue of respondent's liability is meritless. This is precisely the type of insubstantial lawsuit that the Court in *Harlow* (457 U.S. at 818) and *Davis* (slip op. 11) held should be terminated quickly. As the court of appeals recognized (Pet. App. 6a), respondent did not violate any of petitioner's rights; indeed, petitioner had little reason to complain about respondent's conduct at all, since it effected no seizure of petitioner's property and merely served to perfect a tax lien that had arisen automatically when the assessment itself was made (I.R.C. § 6322). The lien, moreover, was released by the IRS "three months later before any of [petitioner's] property had been seized" (Pet. App. 3a). Petitioner's allegations were "bare allegations of malice [that] should not suffice to subject government officials either to the costs of trial or to the burdens of broad-reaching discovery" (*Harlow*, 457 U.S. at 817-818), and the case was properly disposed of by summary judgment.

It is therefore respectfully submitted that the petition for a writ of certiorari shoul be denied.

REX E. LEE
Solicitor General

APRIL 1985

DOJ-1985-04

Office - Supreme Court, U.S.
FILED
APR 24 1985
ALEXANDER L. STEVAS,
CLERK

(3)

NO: 84-1109

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

HANS BOTHKE, Petitioner

v.

ERNEST L. RACCA, Respondent

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

REPLY TO THE RESPONDENT'S OPPOSITION

(Pursuant to Rule 22.5 of this Court)

HANS BOTHKE
400 S.Flower # 156
Orange, Calif. 92668
(714) 978-2724

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

NO: 84-1109

HANS BOTHKE, Petitioner

v.

ERNEST L.RACCA,Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT.

REPLY TO THE RESPONDENT'S OPPOSITION

(Pursuant to Rule 22.5 of this Court)

The respondent's memorandum in opposition to the petition for a writ of certiorari misstates the facts and law in the record, is contradictory,raises first time arguments, and necessitates this reply.

On page one of respondent's memorandum, the respondent asserts based on the appeal

court's ruling that Racca was entitled to qualified immunity for his action filing a notice of federal tax lien against Bothke's property. The respondent thereby conveniently ignored and mistated the facts in the record which show that the filing of the lien was undertaken knowingly and willfully by Racca during an audit requested by the IRS when in fact warned by Bothke of the ongoing audit.(App.I,page 18a to 21a and App.J,page 22a of the petition). Accordingly it was not the IRS filing the lien as falsely alleged by the respondent,but it was Racca who thereby waived his immunity defense which is afforded only by following proper IRS agency adjudication process,"Audit" and"Deficiency procedure",Stankevitz v.IRS,640 F 2d 205 and Davis v.US,47 AFTR 2d 81-454,which Racca totally and knowingly ignored.

The respondent also raised for the first time the argument that Bothke's claimed deductions are not cognizable under the Internal Revenue Code. This argument is totally

irrelevant to the set forth issues in this case,and if even for argument sake accepted as true,this allegation does not authorize Racca to violate established due process rights of Bothke and precise presrcibed revenue procedures as set forth under Section 6211,6212,6213,6321,6322 and 6331.[1]

Bothke will graciously set forth a rebuttal to this illfounded argument with the well established facts by Courts that "where the Code is silent the common law governs." Cole v.Rush,289 P 2d 450,45 C 2d 345,54 ALR 2d 1137;Victory Oil Co.v.Hancock Oil Co, (1954) 125 CA 2d 222,270 P 2d 604,hear.den; US v.Gervato,340 F Supp 454,vac.474 F 2d 40, cert,den.94 S Ct.39,414 US 864,38 L Ed 2d 84.

An examination of the common law demonstrates that the respondent's alleged support for the production of income is well recognized in Redfield v.Fisher,S.Ct.Oregon,292 P 813 stating: "The individual,unlike the corporation,cannot be taxed for the mere pri-

[1] (App.E,F,page 12a to 15a,pet.)

vilege of existing***and the individuals rights to live are natural rights;Upheld also by the US Supreme Court in Adams v, Tanner,244 US 590 stating: "You take my life when you do take the means whereby I live."

It must be recognized that unpublished opinions of Court of Appeals,as in this case, do not become part of the common law.State v.Fitzpatrick,491 P 2d 262,5 Wash.App.661.

In view of respondent's raised first time argument,he raised an additional dispute subject to proposed taxes and deficiency provisions under Section 6212 and 6213 26 USCA, wholly untenable under respondent's set forth contention of a mere mathematical error under Section 6213(b)(1) as established in Muse v.Enochs,164 F Supp 561,aff'd in Enochs v.Muse,270 F 2d 528.

The set forth allegation throughout his memorandum by respondent,that Bothke was informed of a tax deficiency assessed against him by the IRS is clearly preposterous,when in fact the IRS initiated proper

agency adjudication proceeding by audit,(App. J.,page 22a,petition) during which Racca knowingly filed the tax lien on Bothke's property(App.K,page 23a,pet.) in violation of the herein above set forth revenue law.

If in fact a deficiency assessment would have existed as claimed by respondent,why would the IRS initiate audit proceedings subsequent an established deficiency assessment? In view of the above set forth facts the respondent's statements are false,blatent, ruthless,and without credibility.

An additional set forth lie by the respondent on page one,that a notice of correction of mathematical error was sent to Bothke pursuant to Section 6213(b)(1) is readily recognized by the fact that said notice (App.G,page 16a and 17a,pet.) does not indicate any statutory authority,but only invites a respond which Bothke had sent promptly,requesting a notice of deficiency (App.H,page 17a and 18a,pet.) which was not existing.

The set forth contention by the respondent that the tax lien filed by Racca did not effect a seizure, is also preposterous when in fact such lien is officially recorded with the County Recorder, draws interest and penalties, and restricts sale and transfer of property.

The courts have also established that levying and seizing property by low level IRS agents like Racca, constitutes a "ministerial" activity, Mark v.Groff, 521 F 2d at 1380-81 and CF G.M. Leasing v.US, 560 F 2d at 1014 cited in Bothke v.Fluor and Terry, 713 F 2d at 1413, and not as falsely set forth by the respondent to be a discretionary activity which is subject to qualified immunity defense.

In light of the fact that "ignorance of the law is no excuse" 50-80, 16 Op.Atty.Gen.57, and "law should not tolerate even a small injustice nor the appearance of it", Hughes v.Gengler, 404 F 2d 229, cert.den.89 S.Ct.870, 393 US 1085, 21 L Ed 2d 778,

IT is respectfully submitted that the petition for a writ of certiorari should be granted, on the grounds set forth in Bothke v. Fluor and Terry, supra, cert. granted 83-1506, and Davis v. Scherer, 104 S.Ct. 2404, 76 L Ed 2d 648 (1983).

Dated: April 22, 1985.

Hans Bothke
petitioner in pro per.